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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re BRANDON C.,

a Person Coming Under the Juvenile Court Law.

B262593
(Los Angeles County
Super. Ct. No. DK08685)

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

S.C.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,
Akemi Arakaki, Judge. Affirmed as Modified.

William Hook, under appointment by the Court of Appeal, for Defendant
and Appellant.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant
County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and
Respondent.

Mother S.C. appeals from the juvenile court's order declaring her son Brandon C. (born Sept. 2000) to be a dependent child under Welfare and Institutions Code section 300.¹ The court sustained the amended petition as to father K.C. (not a party to this appeal) based on allegations that father sexually and emotionally abused Brandon and also abused alcohol. As to mother, the only sustained allegation was under section 300, subdivision (b), that she was unable to protect Brandon from father's alcohol abuse. On appeal, mother's sole contention is that the court erred in sustaining that allegation. We agree, because the allegation is insufficient to support jurisdiction based on mother's conduct, absent a finding that her inability to protect Brandon created a current substantial risk that Brandon would suffer serious physical harm in the future. However, the court expressly declined to make such a finding. Therefore, we modify the court's jurisdictional order and the amended petition to delete any reference to mother. In all other respects, we affirm.

BACKGROUND

As initially filed by the Los Angeles County Department of Children and Family Services (DCFS), the petition regarding Brandon alleged four counts. Counts b-1 and d-1 alleged under section 300, subdivisions (b) and (d), respectively, that father sexually abused Brandon from 2011 to 2014. Count b-3 (there was no b-2) alleged under section 300, subdivision (b), that father abused alcohol, rendering him unable to care for Brandon. Count c-1 alleged under section 300, subdivision (c), that father emotionally abused Brandon. As to

¹ All undesignated section references are to the Welfare and Institutions Code.

mother, each count contained allegations that mother knew or reasonably should have known of father's conduct and failed to protect Brandon.

By the time of the jurisdiction hearing on March 2, 2015, DCFS's investigation revealed the following. Mother and father had been married for more than 15 years. Father consistently consumed excessive alcohol, watched pornography in the living room, and masturbated. He did so in front of Brandon and mother, despite mother's repeated protests and demands that he get counseling. Mother and Brandon moved out of father's home in September 2014, and mother filed for divorce, seeking full custody of Brandon.

In November 2014, Brandon told his pediatrician that father had been touching his penis regularly since he was in the sixth grade. Shortly afterward, when interviewed by the assigned case worker, Brandon denied that father touched him.

However, in December 2014, Brandon told the case worker that father had fondled his genitals at least once a week since he was in sixth grade. According to Brandon, mother was not present when the incidents occurred; she was in the kitchen cooking or running errands. Brandon had been afraid to disclose the abuse before he and mother moved out because he did not want to say anything that would cause his parents to fight. Brandon also reported that father yelled at mother late at night, and frequently degraded him, saying Brandon was "stupid" and did not know anything. In February 2015, Brandon repeated his allegations of sexual and emotional abuse to a Dependency Investigator. Brandon felt loved and supported by mother, but never wanted to see father again.

In his testimony at the adjudication hearing, Brandon (then age 14) testified father first touched his genitals when he was six years old, and continued to do so

until Brandon and mother moved out. Brandon did not tell anyone about the abuse.

At the adjudication hearing, counsel for DCFS argued the allegations should be sustained as to father. Concerning mother, counsel argued that the references to mother in counts b-1 and d-1 (alleging father's sexual abuse) should be deleted, because there was no "evidence that she knew or should have known of . . . sexual abuse." As to counts b-3 (alleging father's alcohol abuse) and c-1 (alleging father's emotional abuse of Brandon), she argued that mother knew of father's conduct, but was unable to protect Brandon. Therefore, counsel asked that the language of counts b-3 and c-1 be amended to allege mother "was unable to protect" Brandon, rather than that she "failed to protect" him. Brandon's attorney joined in DCFS's remarks.

Mother's counsel concurred that mother should be dismissed from counts b-1 and d-1. He also argued that mother should be dismissed from counts b-3 and c-1, because the relevant point for jurisdictional purposes was not whether mother was unable to protect Brandon, but whether DCFS had proved there was a substantial risk that mother's conduct would cause Brandon serious physical or emotional harm in the future. Mother's counsel argued: "I think there is not a hint here that there is any concern that mother is getting back together with the father or with anybody who would place Brandon at this kind of risk again going forward. And the question then is . . . [h]as the Department met its burden to show more likely than not that the mother is going to reengage [in] a relationship with the father or somebody else who is going to then place Brandon at some kind of risk described in the petition going forward?" Counsel argued that DCFS had not met that burden.

The court sustained all counts against father. As to mother, the court struck her from all counts except count b-3, relating to father's alcohol abuse. As to that count, the court amended the petition to strike the references to mother's failure to protect Brandon, and to allege that mother "knew of father's substance abuse and was unable to protect the child in that mother allowed the father to reside in the child's home and have unlimited access to the child."

Mother's counsel inquired whether the court was "finding that the mother continues to pose a risk and failure to protect this child?" The court replied, "No, not at all. I am amending the language. Mother knew of the abuse and was unable to protect the child at that time." Mother's counsel stated, "Your Honor, I don't want to argue further, but . . . my understanding of the law [is] if the court cannot find that there is a current or future risk, then she should be struck from the petition." The court thanked counsel, but stated that it was deleting any the references to mother's failure to protect, and instead "[e]ssentially, the only language that pertains to the mother at all is going to be her inability to protect as to the alcohol count."

Thus, as sustained, count b-3 alleged in, in substance, that father's alcohol abuse endangered Brandon's physical health and safety, and placed him at risk of physical harm. It also alleged that mother knew of the abuse and was unable to protect Brandon, but did not allege that mother's inability to protect Brandon endangered Brandon or placed him at risk of harm.²

² As sustained, count b-3 alleged in relevant part: "[F]ather . . . has a history of substance abuse and is a current abuser of alcohol, which renders the father incapable of providing regular care and supervision of the child. On prior occasions in 2014, the father was under the influence of alcohol while the child was in the father's care and supervision. The child's mother knew of the father's substance abuse and was unable to protect the child in that the mother allowed the father to reside in the child's home and

DISCUSSION

Mother contends that the court erred in sustaining count b-3 as against her. We agree.³

Count b-3 was brought under section 300, subdivision (b), which, as here relevant, authorizes dependency jurisdiction where “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child, . . . or by the inability of the parent . . . to provide regular care for the child due to the parent’s . . . substance abuse.” ““A jurisdictional finding under section 300, subdivision (b) requires: “(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) ‘serious physical harm or illness’ to the child, or a ‘substantial risk’ of such harm or illness.” [Citation.]’ [Citations.] The third element ‘effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur).’ [Citation.]””” (*In re Jesus M.* (2015) 235 Cal.App.4th 104, 111.)

Here, count b-3 was not based on an allegation that Brandon had actually suffered serious physical harm as a result of father’s alcohol abuse. Rather it was based on the allegation that he was at risk of such harm. Thus, as to mother,

have unlimited access to the child. The father’s substance abuse endanger[s] the child’s physical health and safety, and place[s] the child at risk of physical harm [and] damage.”

³ DCFS argues that we need not consider mother’s contention, because jurisdiction was properly asserted based on father’s conduct alone. However, because the outcome of the appeal will determine whether mother is or is not an offending parent, we elect to consider the issue. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763.)

jurisdiction could be based on her inability to protect Brandon from father's alcohol abuse only if her inability created a future risk that Brandon would suffer serious physical harm or illness. "As appellate courts have repeatedly stressed, "[s]ubdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial risk of serious physical* harm or illness.'"" (Jesus M., *supra*, 235 Cal.App.4th at p. 111.)

In the present case, the court did not find that mother's inability to protect Brandon created a current substantial risk of future serious harm. To the contrary, Mother's counsel inquired whether the court was "finding that the mother continues to pose a risk and failure to protect this child?" The court replied, "*No, not at all*. I am amending the language. Mother knew of the abuse and was unable to protect the child *at that time*." Thus, it is clear that the court was not finding that at the time of the hearing, mother's inability to protect Brandon created a substantial risk of future harm, but only that mother had been unable to protect Brandon "at that time," meaning in the past. The court then deleted that portion of count b-3 which alleged that mother's "failure to protect" Brandon placed him at risk of harm. The court did not find, and did not substitute any language alleging, that mother's inability to protect Brandon placed him at risk of harm.

DCFS argues that substantial evidence supports the court's jurisdictional findings as to mother. However, the record shows that the court's findings were inadequate to support jurisdiction based on mother's conduct, because the court expressly did not find that mother's inability to protect Brandon from father's alcohol abuse exposed Brandon to a current substantial risk of future serious physical harm or injury. Thus, regardless of whether, on the evidence presented, the court might have found that element of jurisdiction satisfied, the court did not

do so, and we will not substitute our judgment for that of the court. In short, the jurisdictional order and amended petition must be modified to delete any reference to mother.

DISPOSITION

The jurisdictional order and amended petition as sustained are modified by deleting any reference to the following allegation of count b-3: “The child’s mother knew of the father’s substance abuse and was unable to protect the child in that the mother allowed the father to reside in the child’s home and have unlimited access to the child.” With that modification, the order is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.